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IN THE

Supreme Court of the United States

October Term, 1950.

No. 277.

ISLAND CREEK FUEL AND TRANSPORTATION COMPANY, a Corporation, - - Petitioner,

versus

H. CLYDE REEVES, Commissioner of Revenue for the State of Kentucky, Et Al., - Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky.

RESPONSE BRIEF FOR KENTUCKY COMMISSIONER OF REVENUE IN OPPOSITION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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No. 277.

ISLAND CREEK FUEL AND TRANSPORTATION COMPANY, A CORPORATION, - - *Petitioner,*

v.

H. CLYDE REEVES, COMMISSIONER OF REVENUE FOR THE STATE OF KENTUCKY, ET AL., - - - - - - - *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

RESPONSE BRIEF FOR KENTUCKY COMMISSIONER OF REVENUE IN OPPOSITION.

OPINION BELOW.

The unanimous opinion of the Court of Appeals of Kentucky upholding Kentucky's non-discriminatory ad valorem general property tax as applied to the Company's boats and barges, apportioned on a route-mileage basis, was originally rendered on March 17, 1950. The Kentucky Court followed this Supreme Court's opinion of a short time previous (1949), *Ott,*

Commissioner, v. *Mississippi Valley Barge Line Company, et al.,* 336 U. S. 169, rehearing denied, 336 U. S. 928.

After vigorous arguments on all questions by the Company in a petition for rehearing and in the face of additional strenuous *amicus curiae* arguments against the taxation involved, the Court of Appeals of Kentucky on June 2, 1950, unanimously denied the rehearing and thereby adhered to its decision. Although the opinion has not yet been published in the official Kentucky Reports, it does appear in the Southwestern Reporter (230 S. W. 2d 924), and in this record (R. 167-177).

JURISDICTION.

The jurisdictional aspects of the case are discussed on page 2 of the Company's Petition for Certiorari.

STATEMENT OF THE CASE.

The Petitioner, Island Creek Fuel and Transportation Company, incorporated in Maine (R. 1), with its principal office in Huntington, West Virginia (R. 23, 54) owns, uses, and employs its 2 towboats and 54 barges for the primary purpose of hauling coal of its parent company from a collecting point at Huntington, West Virginia, through the waters of the Ohio River to a distributing area in the Cincinnati, Ohio, region, where the Company maintains extensive loading and unloading facilities opposite Covington, Kentucky (R. 26-28, 32, 54).

The log records of the water craft show that, during the above trips, calls were made at Kentucky ports where barges were left and picked up, and that the very few voyages on other than the above-mentioned regular route were merely occasional random trips which were irregular and sporadic both as to time and route (R. 107-154). None of the Company's water-craft has ever been in Maine, where the Company was incorporated (R. 85).

The territorial and taxing jurisdiction of Kentucky extends to the low-water mark of the Ohio River on the northern shore, thus including the Ohio River within Kentucky.[1]

The sailing channel and course of all river traffic on the Ohio River from Kentucky's eastern boundary (Big Sandy River) to Kentucky's western boundary (Mississippi River) is entirely within the territorial limits of the State of Kentucky, and 94.6% of the entire mileage of the habitual and regular route (Huntington-Cincinnati) is within Kentucky.[2]

A count of voyages recorded in logs of Petitioner's towboats (R. 107-154) reveals that:

> **495** out of a total of **501** voyages of the Company's boats and barges were along the said KENTUCKY ROUTE between Huntington & Cincinnati. 448 were for the entire distance.

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[1] *Indiana* v. *Kentucky*, 163 U. S. 479, and three cases upholding taxation in Kentucky of the Henderson Bridge Co., 141 U. S. 679 (1891), 166 U. S. 150 (1897), 173 U. S. 592 (1899).

[2] Deposition in record of W. I. Gregory, U. S. District Engineers Office, Louisville, Kentucky, and Exhibit "The Ohio River," pp. 84-155, book compiled and published under direction of The Chief of Engineers, U. S. Army, showing sailing channel and detailed navigation maps of the river.

99% of all voyages of the Company's boats and barges were along the said KENTUCKY ROUTE. 89% were for the entire distance.

93.3% of all *Towboat miles* traveled were within KENTUCKY.

94.8% of all *Barge miles* traveled were within KENTUCKY.

116 *Towboat calls* were made to KENTUCKY PORTS delivering and picking up **154** barges.

At Coal Haven, in Campbell County, Kentucky, the Company owned and used permanent mooring facilities in the Ohio River near the south bank for tying up boats and barges when river conditions made it necessary for safety and facility of operation (R. 3, 4). Within the next to the last tax year involved herein the Company transferred these facilities to its own nominee, a Company employee (R. 58-59), but the Company still uses said facilities and they are continuously available for the protection of the Company's boats and barges as before (R. 59-60).

During the tax years involved, **the Company did not list any of its boats and barges for ad valorem property taxation anywhere** and **did not pay any taxes on its said watercraft** (R. 21, 68-71).

The Commissioner of Revenue of Kentucky on behalf of the State and its counties and school districts began proceedings to collect Kentucky's non-discriminatory ad valorem general property tax (Petition, Appendix D) on the Company's boats and barges apportioned to Kentucky and its taxing districts, upon

the basis of the proportion of miles within Kentucky of the regular and habitual route when compared with the total miles of the regular and habitual route everywhere (R. 6-16).

The Company sought to enjoin these tax-collecting proceedings and the Franklin Circuit Court granted such injunction without opinion.[3] The Kentucky Court of Appeals on March 17, 1950 (rehearing denied June 2, 1950), unanimously reversed the lower court and held that the Company's boats and barges were taxable in accordance with the contentions of the Kentucky Commissioner of Revenue (R. 167-177).

DECISIVE PRIMARY CONSIDERATIONS.

The Transportation Company during the years involved, *has not paid any ad valorem property taxes anywhere on its fleet of boats and barges* (R. 21, 68-71), and the Company's Petition for Certiorari herein is an effort to perpetuate for the Company its heretofore sweet enjoyment of total tax immunity, through its avoidance of filing anywhere any tax assessments on such property.

This Supreme Court last year (1949) after full and vigorous hearings of a consolidated case involving several actions brought by major boat and barge lines,

[3]The judgment of the Franklin Circuit Court entered on November 20, 1948, seems to have been based on the authority of *Ott, Commissioner* v. *DeBardeleben Coal Corporation, et al.* (CCA 5), 166 F. 2d 509, decided March 5, 1948, upon which case the Petitioner herein had strongly relied. Subsequently, however, this Court reversed the *DeBardeleben Case* on February 7, 1945 in *Ott, Commissioner* v. *Mississippi Valley Barge Line Company, et al.*, 336 U. S. 169, rehearing denied, 336 U. S. 928. The main support for the Franklin Circuit Court's ruling was thereby destroyed.

decided against such tax immunity in New Orleans and Louisiana. (**Ott, Commissioner v. Mississippi Valley Barge Line Company, American Barge Line Company and Union Barge Line Corporation** (1949), 336 U. S. 169). This Court, after further consideration, also overruled a Petition for Rehearing of the above case (336 U. S. 928).

The primary principle so decided by the Supreme Court may be briefly paraphrased as follows:

> **When a fleet of watercraft owned by a non-resident is habitually employed within a state in interstate commerce, a portion of the fleet, which portion may be determined on the mileage basis, has a taxable situs in the state and is subject to its ordinary non-discriminatory ad valorem property taxes.**

Shortly after this Court's decision in the *Ott Case*, the Kentucky Court of Appeals, in the case at bar, followed and applied the principles decided by this Court, and the boat and barge company involved in the Kentucky case has now filed its Petition for Certiorari to have this Court review the Kentucky case.

The **Company's First Argument** is that its tax immunity should be operative in every tax jurisdiction if the Company can show that during the tax year there was some period of time, however brief or insignificant, when none of its boats and barges were actually in the states where the watercraft was habitually employed. If such a temporary absence could create tax immunity, then any slight inconsequential shift or maneuver by the Company out of the state each year could result

in the unjust situation whereby the Company could receive protection everywhere and pay taxes nowhere, which certainly is foreign and contrary to our jurisprudence and would in effect nullify this Court's decision in the *Ott Case*.

After the *Ott Case* and the Kentucky Court of Appeals' unanimous decision in the case at bar, another court, the United States Court of Appeals for the District of Columbia Circuit, has also unanimously followed the above principles of tax situs and apportionment taxation of watercraft, relying on this Court's opinion and quoting freely from the Kentucky Court of Appeals' opinion (*District of Columbia* v. *Smoot Sand & Gravel Corporation* (decided July 24, 1950, but not yet reported. For full text of the opinion, see Appendix IV, p. 41 of this brief).[4]

The **Company's Second Argument** is that Kentucky is attempting to collect a tax on navigation, contrary to the Northwest Ordinance of 1787, which provides that certain rivers shall be "common highways, and forever free" to United States citizens, "without any tax, impost, or duty therefor," and in violation of the Virginia Compact of 1789 which only provides that "the use and navigation of the river Ohio . . . shall be free and common to the citizens of the United States."

This Court has already decided that these ancient documents are not now effective to impair the power of a state like Kentucky to collect a non-discriminatory tax (*Strader* v. *Graham*, 51 U. S. 82; *City of Cin-*

[4]The Court in the *Smoot Case* left the measure of the apportionment to the lower Court.

cinnati v. *L. & N. R. R. Co.,* 223 U. S. 890; *Henderson Bridge Company* v. *City of Henderson,* 173 U. S. 592; *Kentucky Union Corp.* v. *Commonwealth,* 219 U. S. 140).

Even if the Ordinance should be effective, it is to be noted that it is only a *tax on navigation* which is forbidden. Kentucky is not attempting to tax navigation, but is here merely attempting to enforce collection of a **general** property tax levied on **all property** with a tax situs in Kentucky, not merely on boat and barges, or on other property used in navigation. Kentucky's ad valorem property tax applying to the Company's boats and barges is no more a tax on navigation, for the use of the river, than Kentucky's ad valorem property tax applying to trucks and cars is a tax on motoring, for the use of the highways. Inasmuch as Kentucky's tax is upon the property itself, not the use thereof, all tangible property in Kentucky (including boats and barges) must pay this general property tax, regardless of how the property may be used while in Kentucky.

This Court just a little over a year ago denied the petition for rehearing in the *Ott Case*, in which all federal questions of substance were decided. No adequate, special or important reasons have been advanced which would justify this Court in granting in effect a *second* petition for rehearing of the principles involved in the *Ott Case.*

On the basis of the facts already stated, Kentucky believes this Court would have ample justification to deny the Company's Petition for Certiorari. How-

ever, should the Court desire to go further into the matter, we have set forth below Kentucky's position in greater detail.

ARGUMENT.

THERE ARE NO FEDERAL QUESTIONS OF SUBSTANCE INVOLVED IN THIS CASE WHICH HAVE NOT ALREADY BEEN DECIDED BY THIS COURT.

POINT 1. This Court Has Already Determined Against Any Contentions Based Upon the Due Process Clause or the Commerce Clause of the Federal Constitution.

The apportionment of Kentucky's general property tax herein on the Company's boats and barges upon the mileage basis is identical to that generally applied to railroad cars and rolling stock for over fifty years and finds direct support in this Court's *Ott Decision* of last year (1949).

This Court there held that Louisiana could tax watercraft operating in interstate commerce on the mileage basis, which had been established for railroad cars since 1891 (*Pullman's Palace Car Company* v. *Pennsylvania,* 141 U. S. 18).

In the *Ott Case,* this Court disposed of all Federal constitutional objections by the following decisive language:

> "We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the Commerce Clause is to determine

'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' Nashville, C. & St. L. R. Co. v. Browning, 310 U. S. 362, 365, 84 L. ed. 1254, 1255, 60 S. Ct. 968. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444, 85 L. ed. 267, 270, 61 S. Ct. 246, 130 A. L. R. 1229. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.

"There is such an apportionment under the formula of the Pullman Case. Moreover, that tax, like taxes on property, * * *, has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation. * * * interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. See Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254, 255, 82 L. ed. 823, 826, 827, 58 S. Ct. 546, 115 A. L. R. 944, and cases cited. We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

Inasmuch as the essential facts in the *Ott Case* are practically identical to the facts in the case at bar and there are no distinguishing differences, the above principles enunciated by this Court in the *Ott Case* are also applicable to support the validity of the taxes in this case. The Court of Appeals of Kentucky unanimously

followed this Court early in 1950 and applied the above principles in holding the Petitioner Company herein liable for Kentucky property taxes on its watercraft on the mileage basis.

Later, the principle of tax apportionment was followed in a similar case by the United States Court of Appeals for the District of Columbia Circuit wherein the Court followed this Court's *Ott Division* and Kentucky's decision in the case at bar. (*District of Columbia* v. *Smoot Sand & Gravel Corporation* (decided July 24, 1950, but not yet reported. For full text of the opinion see Appendix IV, p. 41, of this brief).

All three courts, *viz., this Court, The United States Court of Appeals for the District of Columbia Circuit* and the *Court of Appeals of Kentucky*, decided adversely to the Boat Companies on all the questions raised by them in their strenuous and laborious efforts to avoid the tax assessments. In spite of all this law to the contrary, the Petitioner Company herein is still pursuing its efforts to assure itself of the continued delectable enjoyment of its unjust immunity from paying taxes anywhere.

Company's Technical Contention Would Destroy the Effect of this Court's Rule in the 1949 Ott Case and Would Authorize and Make Possible Complete State Tax Immunity for Every Boat & Barge Company.

The Company's primary due process contention as to the requirement of continuous protection resolves itself down to the fallacious claim that Kentucky cannot tax any portion of the Company's boats and barges,

although habitually employed in Kentucky, if there were only a week, or an hour, or even a minute when the Company's entire fleet was temporarily out of Kentucky.

We submit that such a contention, if approved, would overrule the *Ott Case* and, would create a revolutionary new rule, which has never yet been accepted by any court, and would immediately open up alluring opportunities for avoiding taxes on all movable property. It is well known that the hazards of river navigation and the necessity for repairs make it impracticable to operate boats and barges 365 days in the year. In tributary waters in other states emptying into the Ohio River from the north, there are numerous docks and mooring places where boats and barges may be temporarily moored for a day or a week during bad river conditions or for repairs. If the Company is correct in contending that the slightest absence of all its boats and barges from Kentucky any time during the year so breaks the continuity of their use and employment in Kentucky that this prevents them from acquiring taxable situs therein, why would it not be possible for any barge line to tie up its whole fleet in Ohio or Indiana for a few days—or, for that matter, a few hours—until the "noxious barnacles" of Kentucky taxation were washed off by the pure waters of an alien State? Under such a rule, Kentucky waters would be equally effective in removing any pollution of taxability that might attach to the boats from their presence in Ohio or West Virginia or Indiana, and the desired result—**protection everywhere, taxation no-**

where—would follow as a matter of law. The annual gathering in of the fleet to provide non-taxability might well become a national holiday for river boat operators.

This amazing superstructure of strange legal doctrine is attempted to be erected on an assumed foundation of general language never intended to bear such weight.

The Company relies on *People ex rel. N. Y. C. and H. R. R.* v. *Miller*, 202 U. S. 584, which was a 1906 case in which this Court held that New York, as the domiciliary state, could tax all the Company's railroad cars inasmuch as they had not acquired a tax situs in any other state due to the fact that these trips were (202 U. S. 597, 598):

> ". . . *not in the course of travel upon fixed routes*, but *random excursions of casually chosen cars, determined by the varying orders of particular shippers* and the *arbitrary convenience of other roads.*"[3]

From the above statement, it is not difficult to see why this Court concluded that none of the above roving cars on random trips ever established a taxable situs away from the Company's domicile.

Similarly, the decision of *Northwest Airlines* v. *Minnesota* (1944), 322 U. S. 292, holds that the domiciliary state of an aviation company can constitutionally levy a property tax upon airplanes using the domiciliary state as its headquarters and base of operations.

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[3]Emphasis throughout this brief is supplied by the authors of this brief unless otherwise indicated.

Maine, the Corporate domicile of Petitioner Company herein, is neither the Company's headquarters nor its base of operations, and in fact none of its boats or barges has ever been in Maine (R. 85). Thus, the complete separation of the tax situs of the watercraft from Maine is as 100% absolute as even Petitioner could demand. There is nothing in the opinion in the *Miller Case* or the *Northwest Airlines Case* to indicate that property so separated from the corporate domicile cannot acquire taxable situs for portions of its property in the states where such property is habitually employed; the holding in the later *Ott Case* is that it can and does acquire such taxable situs. In fact, the habitual employment of Petitioner's boats and barges in Kentucky is so regular and substantial that any trips on other than the Kentucky Route are properly classified as "random excursions" under the *Miller Case,* and do not disturb the proportionate tax situs within Kentucky.

All of the cases which the Company now cites as supporting its contention, that there must be absolute continuous protection on some portion of the watercraft every minute of the year, were also relied upon by the Mississippi Valley, American, and Union barge line companies and cited by this Court in the 1949 *Ott Decision.* Yet, in spite of this fact and notwithstanding the conception of the District Court (68 F. Supp. 30) and the United States Court of Appeals for the Fifth Circuit (166 F. (20) 509) that some portion of the property must have been uninterruptedly present in the State for the entire year, this Court held that

such decisions must be reversed and that the watercraft should be taxed.

It is highly significant that in the *Ott Case* all of the towboats of the Mississippi Valley Barge Line Company were actually out of the taxing jurisdiction 50% of the year; American's towboats were absent 77% of the time; and Union's towboats were out of the state 84% of the tax year (Appendix I, p. 38, of this brief).

Therefore, it is clear that this Court in the *Ott Case* held that the question of a possible "gap" in the absolutely uninterrupted continuity of the habitual employment of towboats, and possibly the barges, within a certain state throughout the year does not present a constitutional bar preventing that state from taxing a portion of the entire fleet of boats and barges on the mileage apportionment basis.

On page 9 of its Petition for Certiorari, petitioner states:

> "During the five-year period there was an average number of 203 days each year in which both towboats, and their accompanying barges, were simultaneously outside of the state."

Some "random examples" of tie-ups at ports outside of Kentucky, possibly for repairs or because of navigation conditions, are then given.

At first glance, the reader of the quoted words would possibly be led to think that for over half of each of the years referred to—203 days—both towboats and all or most of the barges were outside Kentucky.

An analysis of these figures, and of the quoted language itself, shows that this would be incorrect. The figure "203" is obtained by counting from the logs the number of days in each year on which both of the towboats *left, entered* or *remained* in a port outside Kentucky (R. 160). This results in a greatly distorted picture, wholly unsupported by the proof. The correctness of the count of these out-of-State occasions made by the Petitioner is challenged and denied by Kentucky. Certain glaring inaccuracies are clearly apparent.[6]

Petitioner makes no pretense of accurately accounting for the time of any of the barges. Actually, it is probable that an average of one or more of the barges were at Ashland, Kentucky or some other Kentucky port at all times.

Inasmuch as practically all the towboat voyages began or ended in Huntington or Cincinnati, the towboat was in Huntington on the day the voyage began or ended and in Cincinnati on some portion of the day

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[6]A typical error clearly illustrating Petitioner's utterly erroneous processes of computation is shown by its statement that from November 13th to November 18, 1942, inclusive, the towboat "SUIT *was docked* four days at Huntington and two at Cincinnati" (Petition for Certiorari, p. 10). On the contrary, far from being docked in port, the record (R. 152) shows that the towboat SUIT was actually very much in motion on the Ohio River on each of the above days. On November 13th, the SUIT completed the last part of its Kentucky Route journey from Cincinnati and arrived in Huntington. On November 14th, the SUIT left Huntington and traveled along the Kentucky Route, made a stop at Ironton, opposite Ashland, Kentucky, and proceeded along the Kentucky Route to Cincinnati, arriving there sometime on November 15th. On the next day, November 16th, the SUIT began its return trip along the Kentucky Route. On November 17th, the boat continued its voyage in Kentucky waters, made a stop at Ironton, Ohio, and another stop at Ashland, Kentucky, evidently remaining there for some time before proceeding on to Huntington, arriving there on the next day, November 18, 1942. The SUIT promptly left the same day on another regular journey to Cincinnati along the Kentucky Route. Consequently, the SUIT was not continuously *docked* in port during the above 7 days, but was actually traveling on some part or all of each of these 7 days on the regular route between Huntington and Cincinnati, 94.6% of which is in Kentucky.

the voyage ended or began. The usual voyage covered all or part of three calendar days. The logs do not show the exact number of hours spent on each voyage, or at each port. The boats also made some enroute stops at Kentucky and out-of-state ports. Frequently, a stop at Ashland, Kentucky was also made on the same day as a tow arrived at or departed from Huntington.

Manifestly, such a count of days during "all or part" of which none of petitioner's towboats were in Kentucky is not relevant, and proves nothing of significance. All that it even purports to prove is that on the number of days indicated, during "all or part of the same day" (to quote petitioner's own language, R. 160) all of petitioner's towboats spent some time outside of Kentucky. Therefore, all that Petitioner actually says is that there is an average of 203 "separate occasions on separate days" during a year (R. 160), when all of the towboats were out of Kentucky. Petitioner presented no proof as to the length of time of these occasions. Whether one towboat was absent from the state during the same time of day as the other is not shown. Therefore, it is fallacious for anyone to indulge in the groundless assumption that every one of the said 203 occasions were 24 hours in duration (which would total 56% of the year). Actually, a much more reasonable and logical deduction is that these said occasions were brief in duration because these towboats are owned and employed to transport coal barges on the river and not to languish in port. If the average time on each of the alleged out-of-State occasions was one hour in duration, then there were only 8 full days, or a little over 2% of each year when

both of the Company's towboats were simultaneously out of Kentucky.

Such a wide variation in the results that may be derived under the above two assumptions clearly shows that the proof should not be strained to establish something the Petitioner would like it to substantiate, but clearly has insufficient evidence in the record to do so. The relevance of Petitioner's above claim is even less clear, in view of the *Ott Case* wherein greater breaks of continuity in the presence of the towboats (59% to 84% of the year) was held not to affect the State's taxing power.

The whole line of argument based on the theory that some part of the property must be uninterruptedly present every day of the year if taxable situs is to exist has never yet prevailed in any court. Such a view attempts to attach a controlling importance to something that neither this Court nor any other has ever seen fit to recognize as significant. It would ignore the realities of modern transportation, and throw into utter confusion the constructive efforts of the courts to reconcile the mobility of property in several states with domicile or situs of each separately situated part in one state. It would discriminate against states having little river mileage and states seeking to tax part of the property of a small barge line, leaving valuable property exempt from taxation in those states. It would discriminate against railroads and truck lines simply because their vehicular units are smaller and more numerous and therefore more likely to be found in the taxing state every day. It would open up unpre-

cedented opportunities for escaping just taxation and give many river transportation companies, well able to pay their way, free rights to the protection of property by state law—something no state legislature has granted or would grant by law.

It is Well Settled that Due Process of Law Requires that Interstate Commerce Must Pay Its Fair Share of Non-discriminatory State Taxes.

This Court, in practically every case in recent years involving state taxation of interstate enterprises, has recognized the principle that interstate commerce should pay its way by bearing a non-discriminatory share of the state's tax burden (*Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 254; *Ott Case, supra*).

Even in the cases cited by the Company, it is apparent that this Court is seriously concerned about not permitting interstate vehicles to escape their fair share of the burdens of just state taxation. Thus, it was pointed out in the *Northwest Airlines Case, supra,* that this Court would follow the *Miller Case, supra,* in order to assure that *movable property would not escape proper state taxation.* This Court said (322 U. S. 299):

> " . . . not to subject property that has no locality other than the State of its owner's domicile to taxation there *would free such floating property from taxation everywhere.* And what the Miller case decided is that *neither the Commerce Clause nor the Fourteenth Amendment affords such constitutional immunity.*"

Under the Due Process Clause, this Court upholds the validity of State taxes when the taxpayer enjoys the general benefit of government and orderly civilization. In *State of Wisconsin* v. *J. C. Penney Co.* (1940), 311 U. S. 435, this Court, in upholding the constitutionality of a state tax levied upon a non-resident corporation, laid down the following rule:

> "*A state is free to pursue its own fiscal policies, unembarrassed by the Constitution,* if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred *by the fact of being an orderly, civilized society* . . .
>
> ". . . *government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes.*"

It cannot be denied that during all the times that the Transportation Company has operated its boats and barges on the Ohio River within Kentucky, it has received and enjoyed benefits from Kentucky by being afforded protection and safety for its boats and employees, and by having the privilege and opportunity of operating and doing business under an orderly state government, which maintains peace, order, protection and safety, all of which services were paid for at a very substantial expense to Kentucky and its taxing districts. Many officials and much government machinery and general law are needed to provide such services and opportunities for the Company (Appendix II, p. 39 of this brief). Many special laws ex-

pressly protect the Company's boats, barges, watercraft and persons operating them from offenses of various kinds as set forth in the Kentucky Statutes (Appendix III, p. 40 of this brief).

The protections and services, which Kentucky and its counties extend and render the Transportation Company and those operating their boats and barges and transporting same with their cargoes, was and is, in all substantial respects, similar to that extended to others in Kentucky similarly situated, and operating and conducting transportation enterprises, which are assessed and pay property taxes to Kentucky.

This Court has already specifically held that due process of law is satisfied in a tax case when a State's laws and systems of courts are *ready, willing and capable* of furnishing benefits and protection *when and if requested therefor* (*Greenough* v. *Tax Assessors* (1947), 331 U. S. 486), which is the situation herein.

POINT 2. This Court Has Already Established That the Northwest Ordinance of 1787 Can in No Way Interfere With the Power of a State Like Kentucky to Levy Non-discriminatory General Property Taxes.

Northwest Ordinance is Not Now an Effective Federal Statute.

Originally the Northwest Ordinance was adopted by the Old Continental Congress in 1787 before the adoption of our Constitution. The new Congress in 1789 (1 Stat. at L. 50) did not specifically adopt the

Ordinance as an Act of Congress, but merely set up certain new procedures for the election, succession, and reports of the governor of the Northwest Territory as long as it remained a territory. When all of the states of this territory (which did not include Kentucky) were admitted into the Union there was no longer any possible use for or effect of the Ordinance and as a result, the force of the Ordinance and even of this procedural Congressional Act ceased to exist. Consequently, neither the Ordinance nor the Act appears as an existing Federal Statute in the 1874 and 1878 Editions of *Revised Statutes of the United States*, or in the *Code of the Law of the United States* originally adopted by Congress in 1925, or in any subsequent amendment or revision thereof. Inasmuch as the Northwest Ordinance can in no way be considered a Federal Statute, and obviously not a part of the Constitution of the United States, no substantial federal question is raised by the Company's contention based upon the Ordinance.

Northwest Ordinance Was Superseded by the United States Constitution and Cannot Now Confer Any Jurisdiction on this Court.

This Court settled this question over 100 years ago. In *Strader* v. *Graham* (1850), 51 U. S. (10 How.) 82, 13 L. Ed. 337, in discussing the Northwest Ordinance this Court held that:

> "It has been settled by judicial decision in this court, that *this ordinance is not in force . . . it ceased to be in force upon the adoption of the*

constitution and *cannot now be the source of jurisdiction of any description in this court.*"

Northwest Ordinance Was Never Applicable to Kentucky or the Ohio River in Kentucky.

The provisions of the Northwest Ordinance were never intended to apply, nor have they ever been applied to the Commonwealth of Kentucky or the Ohio River, or to any other state outside of the old Northwest Territory (*Hawkins* v. *Bleakly* (1917), 243 U. S. 210, 216. Even the title of the Northwest Ordinance makes this clear as follows: "An Ordinance for the Government of the Territory of the United States *Northwest of the River Ohio.*" The Northwest Territory, ceded to the United States by Virginia, *only included* the area of the subsequently-formed States of Ohio, Indiana, Illinois, Michigan, Wisconsin and part of Minnesota, and *excluded the Ohio River.* This Court early established and followed the doctrine that Kentucky's territorial and taxing jurisdiction extends to the low-water mark on the northwest bank of the Ohio River, thus including the Ohio River within Kentucky's boundaries and not within the boundaries of the former Northwest Territory (*Indiana* v. *Kentucky*, 136 U. S. 479; *Henderson Bridge Co.* v. *City of Henderson*, 173 U. S. 592).

This Court in *Strader* v. *Graham* (1850), 51 U. S. (10 Howard) 82, decided that the Northwest Ordinance did not apply to an action by a Kentucky master against steamboat operators, who were residents of Ohio, for carrying away a slave from Louisville to

Cincinnati *on their boat on the Ohio River*. The Court, said that the Northwest Ordinance:

> ". . . **could have no force beyond its limits.** . . . The ordinance in question, **if still in force,** could have **no more operation than the laws of Ohio in the State of Kentucky,** and **could not influence the decision . . . in that State, nor give this court jurisdiction upon the subject.**"

Northwest Ordinance Could in No Event Restrict Any State's Sovereign Power to Tax Property After the State's Admission Into the Union.

Even assuming that the Northwest Ordinance might have been effective within the territory of Kentucky, which we strenuously deny for the reasons and authorities pointed out above, nevertheless under this Court's decisions no provision of said Ordinance could place upon any one state or group of states any restrictions on their sovereign powers, including taxation, which was not imposed on all other states.

Escanaba & Lake Michigan Transportation v. *City of Chicago* (1883), 107 U. S. 678.

Huse v. *Glover* (1886), 119 U. S. 543.

Sands v. *Manistee River Improvement Co.* (1887), 123 U. S. 288.

In *City of Cincinnati* v. *L. & N. R. Co.* (1912), 223 U. S. 390, this Court's ruling is stated as follows:

> "But the **Ordinance of 1787** . . . **ceased to be, in itself, obligatory upon such states from and after their admission into the Union as States,** except in so far as adopted by such states and

made a part of the law thereof. This has been the view of this court, so often announced as to need no further argument."

Northwest Ordinance Provisions Do Not Forbid a Non-Discriminatory State Property Tax.

The Company says the Kentucky property tax is forbidden by the provision of the Northwest Ordinance of 1787 which reads as follows:

> "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States as may be admitted into the Confederacy, without any tax, impost, or duty therefor."

This Court has ruled that such provision was only intended to:

> ". . . insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the State. . . ." (*Gilmdell v. American River Bridge Co.*, 113 U. S. 205, 212),

and that the object was to eliminate "any impost or discriminating burden" (*Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 12).

Kentucky has certainly not attempted to levy or collect herein any tax, impost, or duty levied on navigation itself, and the tax herein involved must assuredly impose no "*discriminating burden*" upon the Company. On the contrary, Kentucky is merely collecting an ordinary non-discriminatory general property tax which it levies upon *all* tangible personal property habitually used and employed within Kentucky.

The Supreme Court of Michigan early held that a license tax on commercial fishing boats did not violate the Northwest Ordinance (*People* v. *Netzunky* (1919), 181 Mich. 624, 126 N. W. 844).

A three-judge Federal Court has ruled that the Northwest Ordinance does not prevent the collection of state license and sales taxes on commercial operations on boats within the Ohio River (*Streckfus Steamers* v. *Fox*, 14 F. Supp. 312).

Kentucky's Highest Court years ago also ruled that the Northwest Ordinance does not prevent the application of Kentucky Admissions Tax upon excursion boats on the Ohio River (*Shannon* v. *Streckfus Steamers* (1939), 279 Ky. 649, 131 S. W. 2d 833).

It has also been held that the application of the California Use Tax on a barge company was not contrary to a "no tax" provision similar to the one in the Northwest Ordinance (*In re Los Angeles Lumber Products Co.* (1942), 45 F. Supp. 77, 92-93).

The Supreme Court of Missouri has held that the State Unemployment Compensation Tax on operators of excursion steamboats on the Mississippi River does not violate a similar "no tax" provision in the Missouri Constitution (*Streckfus Steamers, Inc.* v. *Keitel* (1944), 343 Mo. 469, 182 S. W. 2d 587).

In *Higman Towing Company* v. *Corcoran* (1947), 70 F. Supp. 629, which was affirmed by the United States Court of Appeals for the Fifth Circuit (165 F. 2d 789), the Court held that a provision in the Louisiana Act of Admission forbidding any "tax, duty, impost or toll," which provision is practically identical to the navigation provision in the Northwest Ordinance, did not interfere or prevent a non-discriminatory Louisiana income tax on a river barge towing company based upon a ton-mileage formula. Although such an income tax might be considered closer to a toll on the right of navigation itself than a property tax, the Federal District Court had no difficulty in deciding it was not a tax on navigation, but was a valid exercise of the state's taxing powers. In upholding the Louisiana tax as against the provision forbidding a tax, duty, or impost similar to the Northwest Ordinance, the Court said (70 F. Supp. 635):

> "In the first place it must be remembered that *the tax is not imposed upon the use of the navigable waters of the state, as such*, but upon income earned in Louisiana.
>
> * * * * * * *

"Income taxes, *like all other general taxes,* are imposed to provide the state or its sub-divisions with means to discharge governmental functions, which include the protection of life and property in the state. The *operators of barges, tugs,* etc., and other property used for the transporting of merchandise upon the navigable streams and highways of the state, whether resident or non-resident, and whether engaged in intra or interstate commerce, *enjoy equally that protection,* and *taxes which are not imposed directly upon the use of those avenues of commerce, or upon commerce itself, cannot be said to be burdens even upon interstate commerce or the use of these channels of trade within the meaning of that term* . . . It follows that, since the taxing statute here involved *does not affect or place any restriction upon the enjoyment of these rights and privileges,* vouchsafed to users of these avenues of commerce, the contention in that regard is without merit."

Kentucky has cited 14 decisions of this and other courts all of which are good authority for the proposition that the Northwest Ordinance does not prevent the collection of ordinary non-discriminatory Kentucky property taxes on interstate boats and barges plying the Ohio River.

No court decision has ever been cited by the Transportation Company to show that any non-discriminatory state tax has ever been defeated because of any provision of the Northwest Ordinance.

Only Case Cited by Company is Not in Point and Actually Supports Kentucky's Contentions.

The *only case* relied upon by the Company in its Petition herein to support its argument as to the Northwest Ordinance (*Economy Light & Power Company* v. *United States,* 256 U. S. 113), is readily distinguishable. The case involved Illinois, *a state which was actually carved out of the Northwest Territory,* while Kentucky and the Ohio River were and are territorially beyond the boundaries of the former Northwest Territory.

Any statement in the case concerning the Northwest Ordinance was only dicta, inasmuch as the decision was not based upon the enforcement of the Northwest Ordinance, but upon an Act of Congress of 1899 forbidding the states to construct dams in navigable rivers, which enactment was clearly within the power of Congress under the Commerce Clause.

This Court in the *Economy Light Case,* expressly reaffirmed its former decision in the *Escanaba, Huse* and *Sands* cases, *supra,* and ruled that until Congress intervenes, a state has complete power over navigable waters within its boundaries.

The Petitioner herein can point to no currently effective Federal Statute by which Congress has undertaken to act in the field of property taxation of interstate units on navigable rivers.

Therefore, under all the above decisions, including even the ruling in the *Economy Light Case,* cited by Petitioner, Kentucky is free to exercise its sovereign

powers of taxation to collect, on an apportionment based on route-mileage, a non-discriminatory property tax on all owners of property habitually employed within its jurisdiction, including owners of boats and barges operating on the Ohio River.

POINT 3. This Court Has Already Established That the Virginia Compact of 1789 Can in No Way Interfere With Kentucky's Power to Levy Non-discriminatory General Property Taxes.

Virginia Compact is Not a Federal Statute.

The Virginia Compact was merely a statute enacted by the Legislature of Virginia in 1789 proposing that the district of Kentucky be admitted into the Union as a State (13 Hening's Virginia Statutes at Large 17).

Congress by Act of February 4, 1791, admitted Kentucky into the Union as a "*separate . . . independent . . . new* and *entire* member of the United States of America" (1 Stat. at L. 189). Although reference is made in the Act's whereas clause to the original Virginia Statute, *no express restrictions, limitations or conditions whatever* are mentioned in the said Congressional Act admitting Kentucky. Inasmuch as the Virginia Statute of 1789 was never specifically adopted by Congress, and on the contrary the express language of the Act shows a manifest intent to admit Kentucky as an *equal* member state, it is apparent that no provision of the said Virginia enactment, which might restrict Kentucky's equality

with other states, was ever raised to the status of a Federal Statute. Thus, no Federal Constitution or statutory question is raised by the Company's contention in regard to the Virginia Compact.

Virginia Compact Could in No Event Restrict Kentucky's Sovereign Power to Tax Property After Kentucky's Admission Into the Union.

This Court has consistently held that new states admitted into the Union are on an *equal footing* with the older states with respect to rank, the *exercise of sovereign powers,* and the *restrictions placed upon all alike by the federal constitution;* and congress has *no power* to impose upon a state *any condition precedent* at the time of admission, *which would impair that equality.* (See *Coyle* v. *Smith* (1911), 221 U. S. 559.)

Even if it be assumed that the provisions of the Virginia Compact were in some way actually incorporated in the Act Admitting Kentucky (which we deny) then under the above principles it would be invalid for any greater restriction to apply on Kentucky's taxing power than is imposed on any other state under the Federal Constitution.

This Court recognized and upheld Kentucky's unlimited power of taxation after admission into the Union in *Henderson Bridge Co.* v. *City of Henderson* (1899), 173 U. S. 592, 621, wherein this Court considered fully the effect of the Virginia Compact, and held concerning Kentucky:

> "That State came into the Union *equal in all respects* with the States that had accepted the

> National Constitution and *with every power* that belonged to any existing State, and therefore *its power of taxation was in no respect limited or restrained,* except as its exercise was expressly or impliedly limited or restrained by *that instrument.*"

This Court in other cases has upheld the rule that all provisions regarding freedom of navigation, contained in any Act admitting a State are abrogated, superseded and held of no force and effect after such State is admitted into the Union and has adopted its own constitution and established its own government on an equal footing with every other state.

Cardwell v. *American Bridge Co.* (1885), 113 U. S. 205.

Hamilton v. *Vicksburg, S. & P. R. Co.* (1886), 119 U. S. 280.

(See also the 4 other decisions of this Court and relevant discussion under Point 2, p. 24, *supra*.)

It has also been held that a free navigation provision in the California Act of Admission is not now effective to prevent the application of California's Use Tax on a boat company (*In re Los Angeles Lumber Products Co.* (1944), 45 F. Supp. 77, 82-83).

In 1947 the Federal Court for the Eastern District of Louisiana followed the principles of the above cases in *Higman Towing Co.* v. *Cocreham* (1947), 70 F. Supp. 628, wherein the Court was considering the effect of a provision in the Act admitting Louisiana which expressly forbid any tax, impost or duty for

navigation in similar language to that in the Northwest Ordinance, thus being stronger and more specific than the language of the Virginia Compact. Nevertheless, the lower Federal Court held that such provision did not prevent the application of Louisiana non-discriminatory general income tax to owners of boats and barges plying interstate rivers.

The United States Court of Appeals for the Fifth Circuit (165 F. 2d 789) unanimously affirmed this holding expressly following this Court's decision in the *Escanaba Case, supra,* and the *Economy Light Case, supra,* which latter case is so heavily relied upon by the Company herein.

In accordance with the above principles, so thoroughly established and approved by this Court, it is clear that Kentucky's sovereign power to tax since its admission into the Union cannot be impaired by any prior declaration in the Virginia Compact, even though there is made the extreme assumption most favorable to the Company herein, that the Virginia Compact declaration was in some manner incorporated into the Congressional Act admitting Kentucky.

Virginia Compact Provisions Do Not Forbid a Non-Discriminatory State Property Tax.

Kentucky brands as fallacious the Company's idea that the tax herein may be forbidden by the language of a provision of the Virginia Compact of 1789, which reads as follows:

> "The use and navigation of the river Ohio, so far as the territory of the proposed State, or the

territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States."

The obvious meaning of the above language is that the river shall be an unobstructed public highway, open for all to use, without discrimination. No private parties are to be granted a monopoly on the use of the Ohio River. Taxes and imposts are not even specifically mentioned in the Compact as in the Northwest Ordinance. Certainly it cannot be said that immunity from general property taxes is promised, provided for, or intended in the Virginia Compact.

Our national and state highways and streets are "free and common"—all members of the public may use them—but this in no way affords property tax exemption for the busses, trucks and passenger cars that use these avenues of commerce. Our rivers as "public highways" must not provide state tax immunity for boats and barges that are habitually used and employed upon them.

Courts are in agreement that the Virginia Compact does not prevent non-discriminatory taxation. Kentucky's Highest Court in *Eastern Kentucky Coal Lands Corp.* v. *Commonwealth* (1907), 32 Ky. Law Rep. 129, 106 S. W. 260, 273, held that Kentucky's power to levy general property taxes is unimpaired by the Virginia Compact.

This Court affirmed the above ruling of our Kentucky Court in *Kentucky Union Corp.* v. *Commonwealth* (1911), 219 U. S. 140.

A three-judge Federal Court has ruled that the Virginia Compact does not intervene with state license and sales taxes upon excursion boat activity on the Ohio River (*Streckfus Steamer* v. *Fox*, 14 F. Supp. 312). The Federal Court held that:

> "The waters of the Ohio River are none the less 'free' because a business conducted on a steamboat, while navigating the river, is taxed."

Paraphrasing this ruling Kentucky contends herein that the waters of the Ohio River are, none the less "free" because the property value of watercraft navigating the river is taxed.

Kentucky also decided that the Virginia Compact did not intervene with the state's admissions tax upon Ohio River excursion boats (*Shannon* v. *Streckfus Steamer* (1939), 279 Ky. 649, 131 S. W. 2d 833).

Kentucky has made reference to 10 decisions of this and other courts which clearly establish the proposition that the Virginia Compact does not prevent the collection of ordinary non-discriminatory Kentucky property taxes on interstate boats and barges on the Ohio River.

The Transportation Company has never cited any case in which the Virginia Compact has ever been held to prevent any non-discriminatory state tax.

Only Case Cited by Company is Clearly Irrelevant to this Tax Question.

The only case cited by the Company in support of its Virginia Compact argument (*Wedding* v. *Meyler* (1904), 192 U. S. 573), is entirely irrelevant inasmuch

as it does not hold that the Compact is still in force but merely that concurrent jurisdiction for the purpose of service of process, which was originally vested by the Compact in states along the Ohio River, is still possessed by them. By a later case, this Court has determined that state taxing powers are co-extensive with territorial boundaries and that regardless of the extent of jurisdiction agreed upon for other purposes, "the boundary line is the line of sovereignty" for tax purposes (*Central R. R. Co.* v. *Jersey City* (1908), 209 U. S. 473, 478). The possible concurrent powers of other states over the Ohio River for certain purposes is immaterial, inasmuch as it has been settled beyond all doubt by this Court that the Virginia Compact places no limitation on the exercise by Kentucky of its general governmental powers over its territory within the Ohio River (*Nicoulin* v. *O'Brien* (1918), 248 U. S. 113), and that the taxing jurisdiction of Kentucky includes the entire Ohio River which is within Kentucky's territory up to the low water mark on the Northern shore.

Indiana v. *Kentucky* (1890), 136 U. S. 479.

Henderson Bridge Co. v. *City of Henderson* (1891), 141 U. S. 679.

Henderson Bridge Co. v. *Commonwealth of Kentucky* (1897), 166 U. S. 150.

Henderson Bridge Co. v. *City of Henderson* (1899), 173 U. S. 592, 621-622.

CONCLUSION.

We submit that it has been conclusively shown that all the points urged by the Company have already been settled by this Court, that there is no substantial federal question raised which calls for a review, and that the decision of the Court of Appeals of Kentucky is correct and in accord with all applicable decisions of this Court.

For the foregoing reasons, the State of Kentucky respectfully prays that the Company's Petition for a Writ of Certiorari be denied.

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APPENDIX I.

Time of Towboats Out of State in Old Case.

In footnote (1) of the Old Case (336 U. S. 169), this Court points out that the Federal District Court had found that the aggregate percentage of time spent by all of the companies' towboats in Louisiana was approximately as follows:

	Percent of Time in Louisiana
American's tugboats (1942).....	3.0
Mississippi Valley's tugboats (1944).....	10.2
Union's tugboats (1944).....	3.2

The District Court's opinion (69 F. Supp. 31) shows the number of tugboats operated by the respective companies which entered Louisiana waters during the taxable years. Even making the extreme assumption that would be most favorable to petitioner, viz., that no two or more of the six tugboats of American Barge Line Company were ever in Louisiana at the same moment, it follows that there could have been only 22.8% of the year (6 times 3.8%) when any of American's tugboats were in Louisiana. That is, *during a period of more 77 percent of the year no tugboat of American Barge Line Company could have possibly been in Louisiana.*

Making the same assumption for Mississippi Valley Barge Line Company's four tugboats, we find that there could have been only 40.8% of the year 1944 (4 times 10.2%) in which there could have been any of that company's tugboats in Louisiana. That is, *during 59 percent of the year no tugboat of Mississippi Valley Barge Line Company could have possibly been in Louisiana.*

Making the same assumption for Union Barge Line Corporation's seven tugboats entering Louisiana in 1944, we find that there could have been only 22.4% of that year

(7 Otto 125) when any of that company's tugboats were in Louisiana. That is, *during 44 percent of the year no tugboat of Union Barge Line Company could have possibly been in Louisiana.*

Thus, evidently the Supreme Court in the *Hill Case* was not too concerned about the fact that there were long periods of time when no tugboats were in Louisiana inasmuch as there were substantial regular operations conducted within the state and the tax assessment was on an apportionment based on the mileage route in the State.

APPENDIX D.

Some of Kentucky's State and County Officials and Governmental Machinery and General Laws Providing Opportunities, Protections, Benefits and Services to the Transportation Company.

Peace and law enforcement officers, consisting of sheriffs and their deputies, constables and their deputies, State police and County police, Commonwealth Attorneys, County Attorneys, Fire Marshals and their deputies, and numerous other officers, agents and servants.

Grand juries and petit juries, and the machinery for assembling them and putting them into operation.

Numerous courts, such as Magistrate, County, Circuit and Appellate Courts, all of which are maintained at great expense for the purpose of enforcing Kentucky's laws, protecting persons, property, and business, and the reports of which decisions of Kentucky's Court of Appeals constitute a jurisprudence necessary for the protection above enjoyed by.

Multitudes of general laws protecting officers and owners running inland Creek's boats and barges from violence, injury, murder, etc.

Multitudes of general laws protecting property, including the boats and barges of the Transportation Company in Kentucky, from burglary, arson, injury, violence, etc.